

**DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA**

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<b>IN THE MATTER OF</b> the Joint Application of )	
Liberty Utilities Co., Liberty WWH, Inc., )	REGULATORY DIVISION
Western Water Holdings, LLC, and Mountain )	
Water Company for Approval of a Sale and )	DOCKET NO. D2014.12.99
Transfer of Stock )	

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**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S REPLY  
IN SUPPORT OF ITS MOTION *IN LIMINE***

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Liberty Utilities Co. ("Liberty Utilities") and Liberty WWH, Inc. ("Liberty WWH") (collectively, "Liberty"), by and through their counsel, hereby submit to the Montana Public Service Commission ("Commission") this reply in support of Liberty's motion *in limine* to prohibit access to Liberty's proprietary information by certain witnesses and non-regulatory counsel for the City of Missoula ("City"). In its motion, Liberty sought an order *in limine* to prohibit access to Liberty's confidential materials subject to special protections by counsel who have not appeared in this matter, and experts or witnesses retained by the City who are or will be witnesses for the City in the current condemnation matter currently occurring before the Montana Fourth Judicial District Court ("District Court") or who have or plan to consult with the Town of Apple Valley regarding its potential condemnation of Apple Valley Ranchos Water Company. As outlined in Liberty's briefs, allowing access to these individuals is a direct violation of Liberty's property rights, which the Commission has repeatedly recognized and ordered special protections. The City's response does not address any of Liberty's legitimate concerns, or do anything to support its efforts to circumvent the protections the Commission

imposed. As a result, the City's objections to Liberty's motion must be rejected, and Liberty's motion granted.

## ARGUMENT

### **I. THE CITY DOES NOT HAVE A PROPERTY RIGHT AT ISSUE IN THIS CASE, SO ITS DUE PROCESS CONCERNS CANNOT TRUMP LIBERTY'S LEGITIMATE INTEREST IN PROTECTING ITS PROPERTY RIGHTS TO THE CONFIDENTIAL INFORMATION AT ISSUE.**

The City has repeatedly raised issues about its due process rights in this case. However, the City has not established any interest in this case entitling it to due process protections. Under established Montana law, the "threshold requirement" of the City's "procedural due process claim is the [City's] showing of a liberty or property interest protected by the Constitution." *Kiely Const., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 23, 312 Mont. 52, P.3d 836; *see also Dowell v. Montana Dep't of Pub. Health & Human Servs.*, 2006 MT 55, ¶ 23, 331 Mont. 305, 132 P.3d 520 ("concerns about procedural due process . . . do not arise until there is an actual or threatened deprivation of the person's life, liberty or property interest"); *see also ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, 191-92, 903 P.2d 170, 173-74 (1995) (due process considerations come "into play only after plaintiff has shown that it has a property or liberty interest"). The City's due process argument fails as a matter of law because the City has not asserted that it has a constitutionally-protected property or liberty interest entitling it to review Liberty's confidential information. It certainly has not asserted an interest that is superior to the actual property interest Liberty holds in its confidential information this Commission has already recognized. As a result, the City cannot establish an absolute right to access the information at issue, and certainly not by witnesses who are involved in other actions where Liberty's confidential information may be at issue, or by counsel who have not appeared in the current Commission action.

Further, the City has also failed to follow up on Liberty's offers for additional access by the City's regulatory counsel, or to make arrangements to identify witnesses who do not have the

same conflicts. Liberty immediately raised and explained its objections to access by the City's proposed experts at the first opportunity it had to do so. The timing of that identification was exclusively in the control of the City. Under these circumstances, the Commission's NDA does not provide adequate protection against improper use of Liberty's proprietary information. Therefore, given the timing imposed by the City's actions, Liberty's denial of access was appropriate and necessary to protect its property rights, and the City cannot claim a violation of any recognized due process right.

**II. THE CITY HAS NOT PROVIDED ANY JUSTIFICATION FOR ITS ATTEMPTS TO GAIN ACCESS TO LIBERTY'S CONFIDENTIAL MODEL BY A CITY EMPLOYEE, ITS CONDEMNATION VALUATION EXPERTS OR NON-REGULATORY COUNSEL OR ITS SINGULAR FOCUS ON LIBERTY'S MODEL.**

The City criticizes Liberty for its concerns about access to a proprietary model, but fails to offer any explanation of why the individuals it identified need to access the Liberty model to provide testimony in this case or how they are uniquely qualified to offer any relevant testimony in this matter. This case presents an unusual situation for a Commission proceeding, where the parties and their respective experts are usually well known to each other, counsel and the Commission.

In this case, however, the City had not previously identified experts seeking access to any other confidential information, and had made no effort to provide NDA's or identify its witnesses until the day before they had arranged to review Liberty's specially protected, proprietary information. When coupled with an NDA from condemnation trial counsel who has not appeared in this docket and the absence of an NDA from the City's lead regulatory counsel, the circumstances are unusual and from Liberty's perspective, suspicious. The experts' and City employee's role in the condemnation case and in consulting with the Town of Apple provided

ample basis for Liberty's concern about the legitimacy of the City's review of its financial model.

These suspicions are only amplified by the fact that the only confidential information from this docket the City has attempted to share with its experts is Liberty's information and public statements by City officials implying knowledge about the contents of Liberty's financial model. As outlined in Liberty's initial brief, the City has made no efforts to provide any witnesses access to the confidential information previously produced in this case. In addition, after a representative of the City reviewed Liberty's confidential information, *The Missoulian* published an article that contained quotes from councilman Bryan von Lossberg about Liberty's financial model, stating, "Algonquin's interests in this system are clear....They see a system in need of millions of dollars in investment and to them, that's a mechanism to profit by. ***It ties into the financial models that Liberty has withheld.***" (emphasis added) (*The Missoulian*, September 2, 2015, PSC Postpones Mountain Water Proceedings, Citing 'Difficulties') These statements indicate some knowledge of the contents of Liberty's financial model, and councilman von Lossberg's willingness to discuss this issue publicly bolsters Liberty's concerns even further. The singular focus on Liberty's financial model and the public discussion of that model are reasonable bases for Liberty's concern that its proprietary information will be misused if the City's proposed experts are allowed access.

Moreover, to date, the City has not made any attempt to explain why these particular experts need access to Liberty's financial model to offer testimony within their area of expertise. Beyond a vague statement about looking to the left and looking to the right and then settling on experts assisting the City and Town of Apple Valley in their condemnation efforts regarding Park Water affiliates, the City has completely failed to provide any substantive explanation for

why the experts it chose must have access to Liberty's proprietary information. There is no dispute that Dr. Vinso and Mr. Hayward are valuation experts, who have offered opinions regarding the value of Mountain Water's assets in the condemnation case. The City, however, has offered no information to support its claim that they are "undisputedly qualified to offer testimony on issues related to the operation of a water utility" or how access to Liberty's confidential financial projections will assist them in offering such testimony even if they are so qualified. These arguments are subterfuge by the City. It defies common sense for the City to argue that appraisers Vinso and Hayward are experts in operation of a water company. If the City really is concerned about operation of Mountain Water Company under Liberty's ownership, then the City may issue discovery requests to Liberty relating to operation of the utility. The City does not need access to the financial model to explore how Mountain Water Company will be operated under Liberty's ownership.

As the City pointed out in its reference to the Commission's prior discovery orders, the Commission determined that Liberty's due diligence materials are relevant to determining the impact of the transaction on the overall financial health of the acquiring company. *See* Resp. Br., p. 9, citing paras. 9-11, Order 7392k. The City has not provided any information to suggest its experts are qualified to evaluate or offer testimony on these issues. While the Commission has determined that Liberty's due diligence materials are relevant for certain purposes in this docket, Commissioners have repeatedly indicated that valuation is not.

Liberty has repeatedly indicated it will not seek to recover an acquisition adjustment in rates. Liberty intends to own and operate Mountain Water long term, and Liberty is willing to make additional prudent investment into Mountain Water's system as justified by the ongoing needs balanced against future rate impacts. As indicated in Commissioner Kavulla's dissent and

public comments during work sessions, there should be no surprise in this approach. Further, in the condemnation case, the City criticized Mountain Water for failing to invest and fix water losses and other operational issues with the utility. In other words, the City contended that it needs to acquire the system because the Mountain Water system needs substantial infrastructure improvements. Now, the City has reversed course by criticizing Liberty's willingness to make capital improvements to Mountain Water Company.

What's more, the City's suggestion that Liberty will make its acquisition price back through capital investment and future rates misrepresents the rate making process. To the extent that Mountain Water Company invests in plant improvements in the future, such plant and facilities must be necessary, used and useful in order to be included in rate base. Before Mountain Water is allowed to recover any future capital investment through rates, the Commission will need to conduct a thorough rate making proceeding at which point the City, MCC and Commission will have an opportunity to review the prudence of those investments and the appropriate level of recovery that should be allowed. Any return on and of that investment through the ratemaking process is a result of the Commission affirming that such plant is necessary, used and useful in providing utility service to customers. It is not a recovery of any acquisition premium and the City misrepresents the issue in making that argument. Put simply, there can be no suggestion that Liberty will seek to recover the actual acquisition premium for this transaction through rates, and so opinions of value regarding the assets and the overall transaction are not relevant to this docket.

In any event, the City has not provided any information to suggest the experts it has identified are qualified to analyze the information regarding the impact of Liberty's expected future investments or why they must have access to Liberty's proprietary information to conduct

such an analysis. As a result, requiring access by City witnesses who are only qualified to offer valuation opinions does not advance any valid or relevant issue in this case, and is unnecessary for the City to meaningfully participate or the Commission to fully consider the substantive issues in this case.

### **III. INFORMATION DISCUSSED DURING AN APUC INVESTOR CALL DOES NOT HAVE ANY BEARING ON THE ISSUES IN THIS CASE.**

Rather than provide any relevant justification for the needs to override Liberty's undisputed property rights, the City deflects the discussion to focus on statements made by Algonquin Power & Utilities Corp. (APUC) CEO Ian Robertson in response to a question during an investor conference call. The City's arguments, however, ignore that there is no order in the condemnation case prohibiting public disclosure of valuation information, and that neither Liberty nor APUC are parties to the condemnation action and, therefore, are not subject to any order even if there were one in place. Moreover, the information Mr. Robertson provided during the investor call was based on his own opinions and was not in fact based on the statement of claim filed under seal in the condemnation case, because he had not reviewed or read the statement of claim at the time of the call. *See* Letter from Linda Beairsto to Harry Schneider, attached to City Resp. Br. as Exhibit D. As a result there is no basis to claim that Liberty, APUC or any of their representatives have violated any binding confidentiality order or agreement in the condemnation case to which they are not parties. Moreover, the investor call discussion has no bearing on the issues before the Commission in this case, or the proprietary nature of the information at issue in this motion.

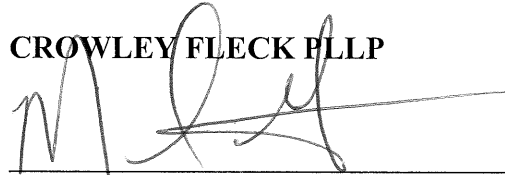
### **CONCLUSION**

The City has failed to establish that the experts at issue are qualified to offer opinions in this matter for which Liberty's proprietary information may be relevant. As a result, the City has

failed to establish a valid basis for overriding Liberty's property rights in this information to require access, or to overcome the concerns Liberty addressed in its opening brief. For the foregoing reasons, the Commission should, therefore, grant Liberty's motions *in limine*.

Submitted this 11<sup>th</sup> day of September, 2015.

**CROWLEY FLECK PLLP**

A handwritten signature in black ink, appearing to read 'Michael Green', is written over a horizontal line.

Michael Green

John M. Semmens

CROWLEY FLECK PLLP

P. O. Box 797

Helena, MT 59624-0797

Telephone: (406) 449-4165

Fax: (406) 449-5149

mgreen@crowleyfleck.com

jsemmens@crowleyfleck.com

**ATTORNEYS FOR LIBERTY UTILITIES CO. AND  
LIBERTY WWH, INC**



**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that on September 11, 2015, the foregoing pleading was served via electronic and U.S. mail on:

Thorvald A. Nelson  
Nickolas S. Stoffel  
Holland & Hart LLP  
6380 South Fiddlers Green Circle  
Suite 500  
Greenwood Village, CO 80111  
tnelson@hollandhart.com  
nsstoffel@hollandhart.com  
cakenedy@hollandhart.com  
aclee@hollandhart.com

Christopher Schilling, CEO  
Leigh Jordan, Executive VP  
Park Water Company  
9750 Washburn Road  
Downey, CA 90241  
cschilling@parkwater.com  
leighj@parkwater.com

John Kappes  
President & General Manager  
Mountain Water Company  
1345 West Broadway  
Missoula, MT 59802-2239  
johnk@mtwater.com

Todd Wiley  
Assistant General Counsel  
Liberty Utilities  
12725 West Indian School Road  
Suite D-101  
Avondale, AZ 85392  
Todd.Wiley@libertyutilities.com

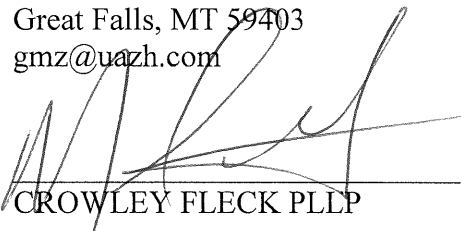
Jim Nugent  
City Attorney  
The City of Missoula  
435 Ryman Street  
Missoula, MT 59802  
JNugent@ci.missoula.mt.us

Scott M. Stearns  
Natasha Prinzing Jones  
BOONE KARLBERG P.C.  
P.O. Box 9199  
Missoula, MT 59807-9199  
sstearns@boonekarlberg.com  
npjones@boonekarlberg.com

Robert Nelson  
Monica Tranel  
Montana Consumer Counsel  
111 North Last Chance Gulch, Suite 1B  
Box 201703  
Helena, MT 59620-1703  
robnelson@mt.gov  
mtranel@mt.gov

Barbara Chillcott  
Legal Director  
Clark Fork Coalition  
140 S 4<sup>th</sup> Street West, Unit 1  
P.O. Box 7593  
Missoula, MT 59801  
barbara@clarkfork.org

Gary M. Zadick  
UGRIN, ALEXANDER, ZADICK &  
HIGGINS, P.C.  
#2 Railroad Square, Suite B  
P.O. Box 1746  
Great Falls, MT 59403  
gmz@uazh.com



CROWLEY FLECK PLLP